



Outside Counsel

Expert Analysis

The Duty of Good Faith In Mediation Proceedings

Mediation is a process generally in which parties engage a neutral third person to help them reconcile or resolve a problem or dispute. During mediation, positions are presented and heard, underlying interests are revealed and considered, risks are analyzed and assessed, and options for resolution are explored. A skilled mediator assists in the process of identifying issues, pursuing areas of agreement and negotiating solutions to disagreements. Any settlement is voluntary and cannot be imposed on the parties.

As practitioners are routinely reminded, the duty to act in good faith permeates the law. Parties commonly agree to mediate a dispute with the expectation that all parties intend to engage in the mediation process in a good faith effort to resolve the issues between them. Good faith is integral to the process of mediation—it would be difficult if not impossible for mediation to succeed without it.

As court-annexed mediation has become common in federal, bankruptcy and state courts, parties are regularly ordered to engage in mediation of disputes. Under those circumstances, submitting a dispute to mediation is not voluntary. Nonetheless, the duty to mediate in good faith remains.

Various New York court rules explicitly confirm the duty to participate in mediation in good faith. The Local Rules for the United States District Court for the Southern District of New York provide:

The assigned Judge or Magistrate may determine that a case is appropriate for mediation and may



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order that case to mediation with or without the consent of the parties. SDNY, R. 83.12(e).

Once a party enters into mediation, “The attorney primarily responsible for each party’s case shall personally attend the first mediation session and shall be fully authorized to resolve the matter and prepared to discuss all liability issues, damage issues, and the party’s settlement position in detail and in good faith.” SDNY, R. 83.12(j). Similarly, the Western and Northern Districts of New York require that parties participate in court-ordered mediations in good faith. WDNY ADR Plan, §5.8(G) (revised Jan. 1, 2008); NDNY, R. 83.11-5(c).

New York state courts have not ruled on whether mediation proceedings carry a good faith requirement.

The Bankruptcy Court for the Southern District of New York also may order parties to engage in good faith mediation. Bankr. SDNY Gen. Order M-390, R. 1.1 (“The Court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee.”).

General Order M-390 issued by the Bankruptcy Court for the Southern District of New York requires: “A representative of each party shall

attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues....The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference.” Bankr. SDNY Gen. Order M-390, R. 3.2. Other bankruptcy court rules provide mechanisms for reporting a party’s failure to participate in good faith in the mediation process. Bankr. EDNY, R. 9019-1(e).

Further, Federal Rule of Civil Procedure 16(f) allows a court to issue sanctions if a party does not participate in good faith in a pretrial conference. Fed. R. Civ. P. 16(f). However, the comments to the Federal Rules of Civil Procedure note, in part, that “it is not the purpose of Rule [16(c)(2)(I)] to impose settlement negotiations on unwilling litigants.” Fed. R. Civ. P., Rules Advisory Committee Notes (1983).

State Court Rules

State court rules requiring good faith in mediation are less explicit than the federal court rules. The Commercial Division rules of the New York State courts provide: “At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation.” 22 NYCRR §202.70(g), R. 3. The Commercial Division rules do not, however, specify a good faith requirement or make any comment as to how parties must conduct themselves in mediation.

Nor do the general rules for New York State courts contain provisions regarding mediation or alternative dispute resolution, although parties proceeding in bad faith during settlement negotiations may find themselves subject to sanctions pursuant to Section 130-1.1 of the Rules of the Chief Administrator of the New York State Courts, which addresses “frivolous” conduct. 22 NYCRR §130-1.1(a).

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The New York Rules of Professional Conduct do not include a specific requirement that attorneys proceed during mediation in good faith. The rules, however, include the general requirement that: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." N.Y. Rules of Professional Conduct, R. 3.1(a).

Even where rules explicitly require good faith, they do not expressly define good faith in the context of mediation. Black's Law Dictionary provides a general definition of good faith: "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."

Case Law

Good faith as applied to mediation has been analyzed in case law—generally in the context of an application for the imposition of sanctions against a party. Parties have been sanctioned for objective failures to participate in mediations in good faith. Implicit in the concept of good faith is that parties will participate in a mediation in accordance with the directives contained in a court's order. See *Nick v. Morgan's Foods, Inc.*, 99 F.Supp.2d 1056, 1063 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590, 596 (8th Cir. 2001).

The U.S. Court of Appeals for the Second Circuit has upheld sanctions where the principal of a party failed to appear for the mediation as ordered, since it "impaired the usefulness of the mediation conference." See *Negron v. Woodhull Hosp.*, No. 05 Civ. 4147, 173 Fed. Appx. 77, 79, 2006 WL 759806, at 1 (2d Cir. 2006). Failure to submit a court-ordered mediation statement has led to sanctions. See *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 596 (8th Cir. 2001).

And a court may sanction a party that does not send a representative to the mediation who has the ability to meaningfully participate and make decisions, including the authority to reconsider that party's position. *Id.*

One court has found that certain defendants failed to mediate in good faith where they moved for summary judgment the day before the scheduled mediation and then offered only \$1,000 in settlement at the mediation, an offer they knew was unlikely to settle the case. See *Fisher v. SmithKline Beecham Corp.*, No. 07 Civ. 0347A(F),

2008 WL 4501860, at 5 (WDNY Sept. 29, 2008). In *Fisher*, the court criticized the defendants for wasting time by failing to make the motion in time for the other parties to seek an adjournment of the mediation session. *Id.*

New York state courts have not ruled on whether mediation proceedings carry a good faith requirement, likely because no state court rule or ethics rule specifically requires good faith in the mediation context. However, applying 22 NYCRR Section 130-1.1, the Suffolk County Supreme Court sanctioned a sub-prime lender which appeared at a settlement conference with "no good faith intention whatsoever of resolving [the] matter in any manner other than a complete and forcible devolution of title." *IndyMac Bank F.S.B. v. Yano-Horoski*, 26 Misc.3d 717, 718, 890 N.Y.S.2d 313, 315 (Sup. Ct., Suffolk Co. 2009).

In what became a total loss for the lender, the court also nullified both the mortgage itself and the subsequently issued adjustable rate note, and dismissed the foreclosure action. *Id.*, 26 Misc.3d at 725-26, 890 N.Y.S.2d at 320. Thus, practitioners should be aware that a New York state court may view a lack of good faith—including in settlement negotiations and potentially in mediations—as sanctionable conduct.

Recently, in the bankruptcy case *In re A.T. Reynolds & Sons*, the issue of good faith arose in the context of a court-mandated mediation and a subsequent sanctions application. 424 B.R. 76, 78 (Bankr. SDNY 2010). The court awarded sanctions based on various factors. The court found that the sanctioned party had not sent a sufficiently senior representative or counsel to the mediation who had full settlement authority to settle the matter or meaningfully participate in the mediation.

The court found that such conduct was "tantamount to not attending" the mediation. *In re A.T. Reynolds & Sons*, 424 B.R. at 89. In the court's view, the lack of settlement authority was evidenced by the fact that the representative could only settle for up to a "predetermined cash amount" and had to make a telephone call in order to make an "ultimate offer of settlement." *Id.* In the court's view, having someone with full authority available by telephone did not satisfy the requirement that a party with full settlement authority attend the mediation. *Id.*

The court also took issue with the party's conduct prior to and during the mediation. *Id.* at 91-92. The court noted that, prior to the mediation, the party had demanded a list of the issues that

would be the subject of the mediation, requested the identities of the other parties' representatives that would be attending the mediation, resisted providing a mediation statement, and insisted that it would only be prepared to address the issues that the debtor had expressly identified for mediation. *Id.*

The court then found that, during the mediation, the sanctioned party simply adhered to and repeated predetermined party positions, interrupted the other parties and refused to let the discussions proceed. *Id.* at 93. Since the process of mediation necessarily entails discussion, risk analysis and consideration of the other parties' arguments, the court reasoned, "attendance at a mediation without participation in the discussion and risk analysis that are fundamental practices in mediation constitutes failure to participate in good faith." *Id.* at 90. The sanctions decision in *A.T. Reynolds* case is currently on appeal.

Conclusion

In sum, there are certain basic indicia of good faith that are easy to identify, such as appearing for the mediation, providing a required mediation statement, having party representatives and counsel participate in the mediation who have the ability to discuss the issues and make decisions regarding settlement, and otherwise complying with the specific directives contained in the applicable court rules or court order. In some respects, though, good faith can be an intangible, abstract quality that is difficult to define.